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No. 86-1125

In The
Supreme Court of the United States
October Term, 1986

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David L. Wilkinson
Attorney General of the State of Utah,
Appellant,

v.

Connie R. Jones, et.al.,
Appellees.

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On Appeal From The United States
Court of Appeals For The Tenth Circuit

BRIEF OF AMICI CURIAE, THE STATES OF

Arizona	Missouri	Pennsylvania
Kansas	New Hampshire	South Carolina
Mississippi	New Mexico	Washington
		West Virginia

IN SUPPORT OF APPELLANT'S
JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

Table of Authorities ii

Interest of the Amici Curiae 1

I. This Case Raises Substantial Constitutional and Statutory Questions 4

II. The Utah Statute Does Not Violate the First Amendment 12

A. Reasonable Regulation of Indecent Cable Television Programming Promotes Profound State Interests . .12

B. The Lower Courts Erred In Applying A "Pigeon-hole" Test Which Forbids All Regulation of Nonobscene Cable Television Programming. 18

C. The Pacifica Test Applies To The Regulation Of Sexually Explicit Cable Television Programming. 24

D. The Utah Statute Is Not Facially Unconstitutional. 33

III. The Utah Statute is Neither "Overbroad" nor "Vague." 36

IV. Conclusion 43

TABLE OF AUTHORITIES

Cases Page(s)

Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986). 22, 33, 35

Bolger v. Youngs Drug Products Corp., 463 U.S. 650 (1983). 27, 32

Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). 36

Carey v. Brown, 447 U.S. 455, 471 (1980) 31, 33

City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034, (1986). 5, 40

City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925 (1986). 22

Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm, 412 U.S. 94 (1973). 5

Community Communications Co. v. City of Boulder, 660 F. 2d 1370 (10th Cir. 1981). 15

Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982). 1, 29, 30

Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985) . . . . . Passim

Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788 (1985). . . . . .

Cruz v. Ferre (I), 571 F. Supp. 125 (S.D. Fla. 1983). 1, 30

Cruz v. Ferre (II), 755 F. 2d 1415, (11th Cir. 1985). 1, 21, 30

FCC v. Pacifica Foundation, 438 U.S. 726 (1978). . . . 2, 5, 15, 22-33, 37, 42, 43

Ginsberg v. New York, 390 U.S. 629 (1968). 15, 23, 31

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, (1982). 35, 42

Grayned v. City of Rockford, 408 U.S. 104, (1972). 40

Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, (1981). 35

Hillsborough County v. Automated Medical Laboratories, 105 S. Ct. 2371, (1985). . . . . .

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, (1982). 40

Home Box Office Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982). . . . 1, 20, 21

Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986) 1, 2, 36

Metro Media, Inc. v. City of San Diego, 453 U.S. 490, (1981). 5

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). . . . . .

Midwest Video Corp. v. FCC, 371 F.2d 1025 (8th Cir. 1977) 2

Miller v. California, 413 U.S. 15 (1983). 2, 19, 21

M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983) 6

New York State Liquor Auth v. Bellanca, 452 U.S. 714 (1981). 22

New York v. Ferber, 459 U.S. 747 (1982). 22, 33, 36

Omega Satellite Products Co. v. City of Indianapolis, 694 F. 2d 119 (7th Cir. 1982). 16, 38

Pacifica Foundation v. FCC, 556 F. 2d 9 (D.C. Cir. 1977). 24

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, (1969). 5

Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970). 23, 31

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). 35, 42

Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F.2d (8th Cir. 1985). 6

Wilkinson v. Jones, 800 F. 2d 989 (10th Cir. 1986). 18, 19, 20, 27, 28, 39

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). 22

Statutes and Ordinances

47 U.S.C. §223 (1984) 6

47 U.S.C. §521 (West Supp 1985 . . . 17

47 U.S.C. §609 (1982 & Supp III 1985) 6

47 U.S.C. §558 17

47 U.S.C. §544 9

47 U.S.C. §559 9

Cal. Gov't. Code §53006.4 (West Supp 1984). 9

Kan. Stat. Ann. § 12-2006 (1982) . . 9

N.J. Rev. Stat. § 48 5A-50 (Supp. 1983). 9

N.Y. Exec. Law §§ 829-1, 830 (McKinney, 1982) 10

R.I. Gen. Laws § 39-19-8 (1977), repealed by, id. (Supp. 1983). . . . 10

S.D. Codified Laws §§ 9-35-17, 18 (1981) 10

Utah Code Ann. § 76-10-1229 (Supp. 1983) (invalidated in Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 986 (D. Utah 1982) 10

Utah Code Ann. § 76-10-1701 to 1708 (Supp. 1983. 10

Wes. Stat. Ann. § 134.43 (Wis. Supp. 1983). 10

Ariz. Rev. Stat. Ann. § 9-510 (Supp. 1983). 10

City of Miami, Fla., Ordinance No. 9223 (Oct. 19, 1981) quoted in Cruz (II), 755 F. 2d at 1416-17. . . 10

Milwaukee, Wis., Code, ch. 99-13 (12)(a)(2), repealed by Ord. No. 210

(Mar. 22, 1985). 10

Roy City, Utah, Ordinance, Title 17, ch. 3 (1982) 10

Articles

Geller & Lampert, Cable Content Regulation and the First Amendment, 32 **Cath. U.L. Rev.** 603 (1983). 8

Gunther, Pay T.V. Sex: How Far Can It Go?, **T.V. Guide**, Mar. 28, 1981, at 4, 5 13

Hofbauer, 'Cableporn' and the First Amendment: Perspectives on Content Regulation of Cable Television, 35 **F.C.C.L.J.** 139 (1983). 8, 10, 13

Krattenmaker & Esterow, Censoring Indecent Cable Programs; the New Morality Meets the New Media, 51 **Fordham L. Rev.** 606 (1983) 8

Note Indecent Programing on Cable Television and the First Amendment, 51 **Geo. Wash. L. Rev.** 254 (1983). . . . 8

O'Connor, Cable Displays A Growing Eagerness to Titilate, N.Y. Times, Apr. 17, 1983, § 2, at 25, col. 4 13

Riggs, Indecency on Cable: Can It Be Regulated?, 26 **Ariz L. Rev.** 269 (1984) 8, 31, 36

Smith, Battle Intensifying Over Explicit Sex on Cable TV, N.Y. Times, Oct. 3, 1983 at A1. col 1 . . . . . 9, 12, 14

Wardle, Cable Comes of Age: A Constitutional Analysis of the Regulation of "Indecent" Cable Television

Programming, 63 **Denver U.L. Rev.** 621, 623-26 (1986). 8, 10, 16, 18, 30, 31, 33, 36

Waters, Cables' Blues in the Night, **Newsweek**, Aug. 24, 1981, at 48 . . . 13

Weinstein, Sex and Cable, **CableVision**, Feb. 11, 1985, at 29 . . . . . .10, 13

INTEREST OF THE AMICI CURIAE

The transmission of sexually explicit programs by cable television into homes where cable television is desired but sexually explicit programming is not has become, in recent year, a matter of grave concern to many states. Laws enacted by several state and local authorities to respond to this problem have been challenged in federal courts by cable system and cable channel operators claiming constitutional immunity from any regulation of nonobscene sexually explicit programming.[1]

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1 See, e.g., Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982); Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982); Cruz v. Ferre (I), 571 F. Supp. 125 (S.D. Fla. 1983); Cruz v. Ferre (II), 755 F. 2d 1415 (11th Cir. (1985) (affirming Cruz (I); Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985) (Wilkinson I); Jones v. Wilkinson, 800

(Footnote 1 continued on next page)

This litigation culminated recently with the split decision of the United State Court of Appeals for the Tenth In that per curiam opinion, two judges summarily affirmed (for "the reasons stated in the [district court's] opinion," 800 F. 2d at 891) the district court's conclusion that the obscenity test of Miller v. California, 413 U.S. 15 (1973) defines the absolute limit of permissible regulation of sexually explicit programming on cable television, and that the principles of FCC v. Pacifica

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(Footnote 1 continued from previous page) F. 2d 989 (10th Cir. 1986) (Wilkinson II). See further Midwest Video Corp. v. FCC, 571 F. 2d 1025, 1037-39 (8th Cir. 1977), aff'd, 440 U.S. 689 (1979).

2 Jones v. Wilkinson, 800 F. 2d 989 (10th Cir. 1986), aff'g. Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985).

Foundation, 438 U.S. 726 (1978), which upheld reasonable regulation of "indecent" broadcast programming, do not apply to cable television. Under the holding of the courts below mere time, place and manner regulations designed to "channel" indecent cable television programming away from objecting cable viewers and from children are facially invalid and unconstitutional per se.

This appeal raises an urgent question of constitutional law: Does the first amendment forbid all regulation of nonobscene but "indecent" sexually explicit programming on cable television? Amici strongly urge the court to hear this case and address this question now, for the erroneous decisions and doctrine of the courts below have improperly frustrated reasonable state efforts to protect and vindicate profound public

interests including the welfare of minors, the privacy of the home, the interests of numerous cable television subscribers who object to the intrusion of sexually explicit programming at any time, on any channel, and the public policy that scarce public resources should not be exploited by profiteering cable operators in a manner that undermines the essential nature and values of the community.

I. THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL AND STATUTORY QUESTIONS

The decisions of the lower courts in this case raise fundamental questions concerning the application of the first amendment to cable television, i.e., the constitutionality of state laws regulating the time, place and manner of transmitting sexually explicit programs to the public over cable television systems.

"[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."[3]

Reasonable regulations of indecent programing in the broadcast media have been upheld by this Court.[4] Likewise federal courts have upheld reasonable time, place and manner regulations of print publications, including "slipcover" requirements applicable to nonobscene but indecent sex magazines.[5] Also, indecent

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3 Red Lion Co. v. FCC, 395 U.S. 367, 386 (1969); see also Metro Media, Inc. v. City of San Diego, 453 U.S. 490 501 (1981); City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034, 2034 (1986).

4 FCC v. Pacifica Foundation, 438 U.S. 726 (1978); see also Red Lion Broadcasting, 395 U.S. at 400-01; Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973); 18 U.S.C. §1464 (1982).

5 See, e.g. Upper Midwest Booksellers

(Footnote 5 continued on next page)

telephone communications (a cable communication system) have long been prohibited by law.[6] Yet the courts below declared that no regulation of nonobscene sexually explicit programming on cable TV is constitutionally permissible.

Regrettably, in an unbroken line of cases,[7] the lower federal courts have created and enforced an absolute "either-or" rule: Either cable television programming is obscene, and can be totally restricted, or it is not obscene and cannot be regulated in any manner.

(Footnote 5 continued from previous page) Ass'n v. City of Minneapolis, 780 F.2d (8th Cir. 1985); M.S. News Co. v. Casado, 721 F.2d 1281 (10th Cir. 1983).

6 47 U.S.C. § 223 (1984); id. at § 609 (1982 & Supp III 1985).

7 See supra note 1.

Application of this doctrine reached its nadir in this case when the court of appeals summarily affirmed the summary judgment prematurely entered by the district court holding that Utah's mere "channeling" regulations embodying "time, place, manner, or context" considerations to protect a family viewing period were unconstitutional.

The issue of the first amendment standard of protection for sexually explicit cable television programming is now ripe for decision. The lower courts have had five years and six opinions in which to develop a workable constitutional solution, but they have failed.[8] The decisions of the lower courts, culminating in the decisions of the courts below, have created a constitutional conundrum by

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8 See supra note 1.

their application of a turgid, "pigeon-hole" test. Legal commentators, likewise, have analyzed the issue extensively in recent years. And while, as expected, they offer a variety of perspectives, the better analysis has concluded that reasonable time, place, and manner regulations of indecent cable television programming do not violate the first amendment.[9] Likewise, lawyers specializing

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9 See generally Hofbauer, 'Cableporn' and the First Amendment: Perspectives on Content Regulation of Cable Television, 35 **F.C.C.L.J.** 139 (1983); Riggs, Indecency on Cable: Can It Be Regulated?, 26 **Ariz L. Rev.** 269 (1984); Wardle, Cable Comes of Age: A Constitutional Analysis of the Regulation of "Indecent" Cable Television Programming, 63 **Denver U.L. Rev.** 621, 623-26 (1986); Note Indecent Programing on Cable Television and the First Amendment, 51 **Geo. Wash. L. Rev.** 254 (1983). But cf. Geller & Lampert, Cable Content Regulation and the First Amendment, 32 **Cath. U.L. Rev.** 603 (1983); Krattenmaker & Esterow, Censoring Indecent Cable Programs; the New Morality Meets the New Media, 51 **Fordham L. Rev.** 606 (1983).

in first amendment litigation have long expected this issue to "ultimately be decided by the Supreme Court." [10]

Many states and local governments have enacted laws responding to the problem of intrusive sexually explicit cable programming.[11] Until this Court

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10 Smith, Battle Intensifying Over Explicit Sex on Cable TV, N.Y,. Times, Oct. 3, 1983 at A1. col 1, and § 3, p. 22 col. 6 (emphasis added):

"Some legal experts predict that the issue of sexually explicit programming on cable television will ultimately be decided in the Supreme Court. A Miami case has already been appealed to a higher court, and a new law passed last Spring in Utah is being challenged in the Federal court.

"The resolution of whether cable is to be more like broadcasting or more like newspapers," Mr. [Floyd] Abrams, the New York lawyer, said, "will determine a good deal of the future of what our country is likely to be watching in years to come."

11 See, e.g., Cal. Gov't. Code § 53006.4 (West Supp 1984); Kan. Stat. Ann. § 12-2006 (1982); N.J. Rev. Stat. § 48:

(Footnote 11 continued on next page)

clarifies the first amendment standards the states will be hamstrung in their efforts to protect critical public interests and the cable television industry will suffer from continued regulatory efforts by states lacking clear

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(Footnote 11 continued from previous page) 5A-50 (Supp. 1983); N.Y. Exec. Law §§ 829-1, 830 (McKinney, 1982); R.I. Gen. Laws § 39-19-8 (1977), repealed by, id. (Supp. 1983); S.D. Codified Laws §§ 9-35-17, 18 (1981); Utah Code Ann. § 76-10-1229 (Supp. 1983) (invalidated in Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 986 (D. Utah 1982); Utah Code Ann. § 76-10-1701 to 1708 (Supp. 1983); and Wes. Stat. Ann. § 134.43 (Wis. Supp. 1983). See also Ariz. Rev. Stat. Ann. § 9-510 (Supp. 1983); City of Miami, Fla., Ordinance No. 9223 (Oct. 19, 1981) quoted in Cruz (II), 755 F. 2d at 1416-17; Milwaukee, Wis., Code, ch. 99-13 (12)(a)(2), repealed by Ord. No. 210 (Mar. 22, 1985); Roy City, Utah, Ordinance, Title 17, ch. 3 (1982) quoted in Roy City, 555 F. Supp. at 1173-74. See generally, Weinstein, supra note 13, at 29; Smith, supra note 10, at 22, Col. 3; Hofbauer, supra note 9, at 174-81; Wardle, supra note 9, at 627, 679 n. 332.

guidance of this Court on an issue of profound importance.

Additionally the courts below both misunderstood and misapplied the "overbreadth" and "vagueness" doctrines and prematurely struck down a state statute which is not only capable of being interpreted in a constitutional manner, but they disregarded the Utah Attorney General's guidelines which gave the statute a modest and limited application.

Finally, the lower courts improperly awarded attorneys fees to the cable companies under the authority of 42 U.S.C. §1988 (1982). It is uncontested that those defendants have substantial assets and have been able to afford to litigate aggressively the issues concerning the constitutionality of cable television indecency regulations. It is also uncontested that the Utah statute was enacted and defended in good faith.

In these circumstances the award of attorneys fees was improper under federal law perverting the congressional purpose of the statute. That statute should not be construed to provide a windfall to wealthy corporations who prevail in cases involving unsettled questions of constitutional law. For all of these reasons, this case raises substantial questions of constitutional law.

II. The Utah Statute Does Not Violate the First Amendment.

A. Reasonable Regulation of Indecent Cable Television Programming Promotes Profound State Interests

There is substantial grassroots citizen discontent today regarding the

"sexploitation" of cable television.[12] Many individuals and families who desire the educational, cultural, and entertainment benefits of cable television but who are unwilling to subject themselves or their children to the uninvited intrusion of sexually explicit programming in their homes are deprived of the benefits cable TV.[13] The state has a

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12 See generally, Smith, supra note 10, at A1, col. 1; O'Connor, Cable Displays A Growing Eagerness to Titilate, N.Y. Times, Apr. 17, 1983, § 2, at 25, col. 4; Gunther, Pay T.V. Sex: How Far Can It Go?, **T.V. Guide**, Mar. 28, 1981, at 4, 5; Waters, Cables' Blues in the Night, **Newsweek**, Aug. 24, 1981, at 48; Weinstein, Sex and Cable, **CableVision**, Feb. 11, 1985, at 29. See also Hofbauer, supra note 9, at 139-42; Wardle, supra note 9, at 623-26.

13 A New York Times article reported that two studies found, respectively, that one-fourth and one-third of the persons interviewed "said they did not subscribe to [cable television] services because they did not want

(Footnote 13 continued on next page)

genuine and growing concern in protecting the interests of citizens who are excluded from access to cable television because of unchanneled exploitive programming.

Cable television reaches directly into the home where not only may it assault unsuspecting adult viewers, but where children may be victimized by exploitive sexual programming. Protecting the well-being of children from premature and potentially damaging exposure to inappropriate sexually explicit programming is a compelling state interest

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(Footnote 13 continued from previous page) their children exposed to some of its programming." Smith, supra note 10, at C22, col. 4. Even a cable industry magazine reported that two surveys it conducted showed that approximately two-thirds of the cable viewers agreed that "adult programs should turn down the steam...." Some Like It Hot, But Won't Tell, **CableVision**, May 14, 1984, at 12.

which the Court has recognized in numerous prior decisions. See, e.g., Pacifica Foundation, 438 U.S. 726 (1978); id. at 758, 59 (Powell, J., concurring); Ginsberg v. New York, 390 U.S. 629 (1968).

Moreover, cable television systems depend upon the near-exclusive use of scarce public resources to operate. Cable operations require the use of public waves, alleys, easements, streets, and condemnation authority to lay and maintain the cables. As the Tenth Circuit noted in another case: "Government and cable operators are tied in a way that government and newspapers are not." Community Communications Co. v. City of Boulder, 660 F. 2d 1370 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982).

It is within the constitutional province of state and local governments to dedicated those resources to purposes

consistent with the character of the community and the quality of its neighborhoods. And it is likewise reasonable for such communities to require cable television companies demanding the use of those scarce public resources to provide programming that is not unfit for general family viewing at least during hours or on the channels when general family viewing is expected. See Wardle, supra note 3, at 650-56; Omega Satellite Products Co. v. City of Indianapolis, 694 F. 2d. 119, 126 (7th Cir. 1982).

Several states and municipalities already have enacted statutes embodying a wide diversity of approaches to dealing with the problem of sexually explicit cable programming.[14] In 1984, Congress also addressed the problem of unfettered

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14 See supra note 11.

exploitation of sexual programming on cable television when it enacted the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 et seq. (West Supp. 1985). In this Act Congress specifically preserved and endorsed state and local laws concerning "obscenity ... or other similar laws...."[15] And notwithstanding the confusing analysis of the courts below, 611 F. Supp. at 1101-05; 800 F. 2d

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15 47 U.S.C.A. § 558 (West Supp. 1985). In another section, Congress specifically preserved the authority of state and local cable franchisers to contractually restrict programs that are "obscene or otherwise unprotected by the United States Constitution." Id. § 544 (d)(1)(Supp. III 1985). Additionally, Congress required cable operators to provide lockboxes to customers upon request. Id. at § 544 (d) (2)(A)(West. Supp. 1985). Congress also made it a federal crime to transmit "any matter which is obscene or otherwise unprotected by the constitution" over cable television systems. Id. §559 (West. Supp. 1986).

at 990-91, the legislative history unequivocally underscores the congressional intent to preserve, not preempt, state regulations of indecent cable programming to the extent allowed under the first amendment.[16] Thus, Congress has recognized that states have profound interests in reasonably regulating sexually explicit cable programs to protect individuals, families, children and community values.

B. The Lower Courts Erred In Applying A "Pigeon-hole" Test Which Forbids All Regulation Of Nonobscene Cable Television Programming

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16 Wilkinson v. Jones, 800 F. 2d at 992-95 (Baldock, J., concurring); Wardle, supra note 9 at 686-92. This Court should decisively clarify that the C.C.P.A. does not preempt state regulation of indecent cable TV programming.

The fundamental mistake made in this case by the lower courts, and by all the lower courts which have addressed this issue, is the assumption that the narrow, strict obscenity test of Miller v. California, 413 U.S. 15 (1973), delimits the boundary of constitutionally permissible regulation of sexually explicit programming on cable television. The district court below denied that the first amendment authorizes some reasonable regulation "beyond the limits articulated in Miller." 611 F. Supp. 1109. On appeal, two judges summarily endorsed this "pigeon-hole" analysis. 800 F. 2d at 990. But Judge Baldock, in his separate concurring opinion, vigorously disagreed. He rejected the wooden suggestion that "sexually oriented material which is indecent is entitled to unlimited constitutional protection merely because

it is not obscene." 800 F. 2d 995-96 (Baldock, J., concurring). Moreover, he cited numerous precedents that demonstrate "that the Miller adult obscenity standard is not the exclusive test to be applied to the regulation of sexually oriented material." Id. at 999.

The courts below were merely perpetuating a mistake which had been made by other lower federal courts. For instance, three years earlier another federal judge invalidating an earlier Utah legislative attempt to restrict sexually explicit programming on cable television, lectured: "States may not go beyond Miller in prescribing criminal penalties for distribution of sexually oriented materials. For better or worse, Miller establishes the analytical boundary of permissible state involvement in the decision by HBO and others to offer, and

the decision by subscribers to receive particular cable TV programming...." In Home Box Office Inc. v. Wilkinson, 531 F. Supp. 987, 994-95 (D. Utah 1982).

In Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982), a federal judge in Utah invalidated a city ordinance attempting to restrict sexually explicit on cable television, and emphasized that it was beyond the power of state or local government "to control communication that is on the protected side of the pornographic line set forth in Miller." Id. at 1171. See also id. at 1172.

The Eleventh Circuit likewise endorsed the notion that regulation of sexually oriented material "beyond the Miller definition of obscenity" is not permissible. Cruz v. Ferre (II), 755 F. 2d 1415, 1418-22 (11th Cir. 1985).

All three of these cases were cited and relied upon by the district court in the case at bar. 611 F. Supp. at 1107, 13, 15, 16.

The "pigeon-hole" analysis that insists that sexually oriented material either is obscene, and can be totally regulated, or not obscene, and completely immune from regulation, is over simplistic and unrealistic. In numerous contexts this Court has unheld reasonable regulation of nonobscene, but sexually explicit material.[17]

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17 City of Renton v. Playtime Theatres, Inc., 106 S. Ct 925 (1986) (adult movie theatres); Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986) (indecent sexual innuendo in speech to high school students); New York v. Ferber, 459 U.S. 747 (1982) (kiddie-porn restrictions); New York State Liquor Auth v. Bellanca, 452 U.S. 714 (1981) (restrictions on topless dancing in bars); FCC v. Pacifica, 438 U.S. 726 (1978) (indecent radio broadcasts); Young v.

(Footnote 17 continued on next page)

Moreover, the line between obscene material and nonobscene material that is sexually explicit and which, under contemporary community cable-viewing standards, is patently offensive and deemed inappropriate for unrestricted transmission to the general public is not wide. Indecent material offends "for the same reason obscenity offends," Pacifica, 438 U.S. at 746 (Stevens, J., plurality opinion), only not to the same degree. Thus, the "pigeon-hole" analysis of the courts below was seriously defective.

(Footnote 17 continued from previous page) American Mini Theaters, Inc., 427 U.S. 50 (1976) (restricted zoning of "adult" theatres); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (statute authorizing Post Office to not deliver offensive mail to addressee at his request); Ginsberg v. New York, 390 U.S. 629 (1968) (prohibition of sale of "girlie magazines" to minors).

C. The Pacifica Test Applies To The Regulation Of Sexually Explicit Cable Television Programming.

In F.C.C. v. Pacific Foundation, this Court upheld a declaratory order of the FCC which reprimanded the owner of a radio station that broadcasted a nonobscene but indecent "adult" monologue one afternoon in October, 1973. An unidentified listener who had tuned into the FM broadcast while driving in his car with his young son complained to the FCC. 438 U.S. at 730. The FCC put a declaratory order in the stations license file to be considered if further incidents occurred. The District of Columbia Circuit overturned the FCC order. Pacifica Foundation v. FCC, 556 F. 2d 9 (D.C. Cir. (1977)). On appeal the Supreme Court addressed the question "whether the First Amendment denies any government any power

to restrict the public broadcast of indecent language in any circumstances." 438 U.S. 744. The Court concluded that it did not and reversed the Court of Appeals. Writing for the court, Justice Stevens noted that broadcasting has received the most limited protection under the first amendment because of its "pervasive presence in the lives of all Americans," and because "broadcasting is uniquely accessible to children." Id. at 748-50. Reasonable regulation of indecent radio communication does not violate the first amendment. The majority emphasized that the time of the broadcast, content of the program, audience, and a host of other variables relating to the context were critical factors for the first amendment analysis. Id. at 750. Justices Powell and Blackmun filed a concurring opinion to emphasize that regulations designed to

channel indecent programming away from children and to protect the home are not unconstitutional. Id. at 757-59 (Powell, J., concurring).

The district court below erroneously concluded that the Pacifica principles do not apply to cable television programming. The trial court noted that the radio broadcast in Pacifica occurred in the afternoon, but the Utah statute did not apply to afternoon programming.[18] Judge Anderson also suggested that Pacifica was somehow qualified because the decision of the court was "closely divided," 611 F. Supp. at 1110 (apparently Judge Anderson

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18 611 F. Supp. at 110, 114-15. In light of the trial court's rejection of guidelines promulgated by the state attorney general defining when sexually explicit could be transmitted on cable television without possibly violating the Utah statute, this is a rather curious basis for distinguishing Pacifica.

made an arithmatic error here), and emphasized that radio and cable television are distinguishable media. Id. at 1115. The district court concluded that the subsequent decision of the Supreme Court in Bolger v. Youngs Drug Products Corp., 463 U.S. 650 (1983) had rendered Pacifica sui generis. 611 F. Supp. at 1111.

While two judges of the Tenth Circuit endorsed this analysis, 800 F. 2d at 990, Judge Baldock properly disagreed. He emphasized that cable and broadcast television are practically indistinguishable when it comes to pervasiveness and accessibility to children, the key analytical factors underline the Pacifica doctrine. 800 F. 2d at 998-1005 (Baldock, J., concurring). Likewise, he refuted the suggestion that government of indecent cable television is unnecessary because viewers voluntarily

subscribe to the medium. Not only do broadcast TV viewers also voluntarily elect (and pay) to obtain access to that medium, but cable television programs just like broadcast television programs, are disseminated to the public in general, not just specific purchasers who select a particular movie or program. Id. at 1005. And the argument that cable television viewers have consented to indecent cable programing by subscribing to the medium "is too simplistic and is akin to the notion to one who hears an indecent broadcast has a remedy by turning it off. This notion was expressly rejected in FCC v. Pacifica . . . ." 800 F.2d at 1006.

The misguided attempt by the courts below to distinguish Pacifica merely capped an error made by other federal courts. For example, in Roy City (one of the cases relied on by District Judge

Anderson) another federal judge in Utah declared: "Pacifica, which deals with broadcasting, transmission of electro-magnetic radio waves through the publicly controlled airways, in not applicable in this case. It is irrelevant." 555 Supp. at 1169. The court reached this conclusion by contrasting (in a remarkable laundry list) some of the operating characteristics of cable television and broadcast television. Unfortunately, none of the characteristics compared had any bearing on any of the analytically significant factors identified by the Supreme Court in Pacifica. Additionally, the court in Roy City concluded that cable television, unlike broadcast TV, is not "pervasive" because that term refers to method of transmitting the program! "Literally it means ever present. It is in the air, or diffused widely. And that

since, broadcasting meets the definition. In that sense it is pervasive because its medium, the air, is pervasive. Transmission by wire is not." 555 F. Supp. at 1169. See also Cruz (I), 571 F. Supp. at 131; Cruz (II), 755 F. Supp. at 1420.

The Pacifica principles apply to cable television for precisely the same reasons the Court in that case held they apply to broadcasting. The pervasiveness of cable television in 1987 is probably greater that the pervasiveness of FM radio in 1973, when the offensive George Carlin monologue was broadcast on the Pacifica radio station. See Wardle, supra note 3, at 623-25, 50-51. "The visual impact of television, both broadcast and cable, coupled with the auditory effect, gives television more impact than the mere words or radio." Id. at 650.

The fact that patently offensive radio broadcast invaded the privacy of the home was emphasized by the Court in Pacifica. 438 U.S. at 748; id. at 759 (Powell, J., concurring). See also Carey v. Brown, 447 U.S. 455, 471 (1980) Rowan v. United States Post Office Department, 397 U.S. at 737. The nature and degree of intrusiveness into the home of cable television is virtually indistinguishable from that of broadcast television programming. Riggs, supra note 9, at 314, Wardle, supra note 9, at 650.

The accessibility of children to indiscriminate programming was another factor emphasized by the Court in Pacifica. 438 U.S. at 749-50; id. at 758-59 (Powell, J., concurring). See also Ginsberg v. New York, 390 U.S. 629, 639 (1968); Rowan, 397 U.S. at 738. The accessibility of children to television

programming is unaffected by whether the television set receives its signals by airwave or cable transmission.

As Pacifica indicated, there is a critical distinction between government attempts to ban absolutely nonobscene programming from a medium, and attempts to reasonably regulate or channel the time, place, and manner of transmitting sexually explicit programming. The Utah statute in this case merely requires that it be "channeled" considering time, place, manner, and context. The failure of the lower courts to appreciate this critical distinction was fatal to their analysis.

Finally the suggestion of the lower courts that this Court has "limit[ed] Pacifica to its facts," 611 F. Supp. at 1111, is wrong. In the case cited to support that mistake, Bolger, this Court simply noted that Pacifica did not justify

an absolute ban of all mailed contraceptive advertisements--"a far cry from the conclusion that the Pacifica approach does not apply at all to regulations of indecent cable television programming." Wardle, supra note 3, at 647. This Court has frequently applied the Pacifica doctrine in recent years--even outside the context of the broadcast media.[19]

D. The Utah Statute Is Not Facially Unconstitutional

In their haste to invalidate the Utah Cable Television Programming Decency Act,

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19 See, e.g., Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. at 3165-66 (high school speech); New York v. Ferber, 458 U.S. at 763 (Kiddie-porn); Carey v. Brown, 447 U.S. 455, 471 (1980) (residential picketing); see also, Board of Education v. Pico, 457 U.S. at 890 (Berger, C.J., dissenting) (school librariens).

the lower courts broadly misconstrued the statute. The district court interpreted the Act to "create a de facto ban of some cable material ...." 611 F. Supp. at 1111.

This misreading of the statute not only flies in the teeth of the unambiguous language of the statute, but disregards the only interpretation of the statute by a state official. See infra Part III.

Unlike prior attempts at cable regulation, the Utah statute only applies to "a continuing course of conduct" rather than isolated incidents of sexually explicit transmission. Utah Code Ann. § 76-10-1703 (Supp. 1983). Moreover, the Act is not a criminal prohibition but a civil nuisance regulation for which fines, rather than imprisonment, are the potential sanctions. Id. at § 1704. And, perhaps most importantly, the Act does not

prohibit the transmission of sexually explicit programming on cable television altogether, but only when "applying contemporary community standards for cable television" it is found to be "presented in a patently offensive way for the time, place, manner and context in which the material is presented." Id. at § 1703.

This Court has frequently upheld a reasonable time, place, and manner regulation of speech.[20]

The regulation of sexually explicit, indecent communication is not content regulation. It is a regulation of the manner of expression, like the regulation

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20 Bethel School District No. 403, 106 S. Ct. at 3159; Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 n. 17 (1982); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75 (1981); Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981); Kovaks v. Cooper, 336 U.S. 77, 85 (1949).

of vulgarity, racial epithets, profanity, etc. See generally Riggs, supra note 3, at 273 n. 78; Wardle, supra note 3, at 663-65.

The lower courts erred in this case when they found Utah's moderate and passive scheme of time, place and manner regulations to be unconstitutional. As Judge Baldock noted, cable television offers a valuable resource to individuals and families, and the first amendment does not prohibit reasonable regulation designed to ensure that it "should be available to all who are willing to subscribe, even those who object to patently offensive indecent material being presented during family viewing hours." 800 F. 2d at 1006 (Baldock, J., concurring).

III. The Utah Statute Is Neither "Overbroad" nor "Vague."

The lower courts apparently misunderstood, as well as misapplied, the "overbreadth" doctrine. This Court has emphasized that the overbreadth doctrine is "strong medicine" and has employed it with hesitation, and then "only as a last resort." New York v. Ferber, 458 U.S. at 769; Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

The lower courts erroneous application of the overbreadth doctrine in this case resulted from two fatal mistakes. First, the courts misunderstood the first amendment, believing that no regulation of nonobscene sexually explicit cable programming is allowable. Second, the courts disregarded reasonable local interpretation of the Act.

In Pacifica this Court emphasized that "context is all-important." 438 U.S. at

750. Likewise, Justice Stevens added that "indecency is largely a function of context--it cannot be adequately judged in the abstract." Id. at 742 (Stevens, J., concurring). The Seventh Circuit emphasized a similar point when it noted: "There is . . . a big difference between the danger of an abuse and the abuse itself; and it is a fair question how far the courts should go in making municipalities rewrite there cable television ordinances to prevent dangers that may be largely hypothetical." Omega Satellites Prod., 694 F. 2d at 128. Unfortunately, in this case the district court, with the endorsement of the court of appeals, blithely disregarded these principles and applied a per se, absolute, either-or dogma.

The district court was of the opinion that "[f]ew facts are relevant to a facial

challenge, because the issue is not analyzed in a factual context." 611 F. Supp. at 1107. Thus, the district court ruled that evidence of the type of sexually explicit programming that was being transmitted over cable television in Utah was "immaterial." Id. Evidence of legislative intent was likewise deemed "immaterial to the constitutional issue . . . ." Id.; see also 800 F. 2d at 1102-03 (Baldock, J., concurring). Most significantly, the district court rejected the official interpretation issued by the Attorney General of the State of Utah for the guidance of local enforcing agencies as not proscribing the transmission of nonobscene but sexually explicit material during "adult viewing hours" (midnight to 7:00 a.m.). 611 F. Supp. at 1115; see also 800 F. Supp. at 1007 (Baldock, J., concurring).

It must be remembered that this case involved a facial attack on a state statute which has never been applied, never even been construed by state courts.[21] In this case, the lower federal courts not only failed to await interpretation of the statute by the state courts, but in passing on the facial challenge to the

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21 It is well established that federal courts should defer to state construction of the state statutes. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n. 5 (1982); Grayned v. City of Rockford, 408 U.S. 104, 110 (1972). In the City of Los Angeles v. Preferred Communications, Inc., this Court declined to rule on the first amendment issue concerning cable television because the record was not sufficiently developed. "We do not think, however, that it is desirable to express any more detailed views on the proper resolution of First Amendment question . . . without a fuller development of the disputed issues of the case. We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the [factual context]." Id. at 2038.

statute the courts below improperly disregarded the only interpretation of it by a state official, an interpretation which emphasized the modest and balanced nature of the regulation.

There are a number of different methods of regulating the "time, place, manner and context" of transmitting indecent cable television programming which conceivably could satisfy the modest demands of the Utah statute. For instance, a cable company might restrict all sexually explicit programming to optional or extra-tier channels, or provide them on a play-per-view basis, or transmit sexually explicit programming with a "scrambler" so that only viewers with decoding devices could receive them, or restrict the transmission of sexually explicit programming to late night hours when children would not be in the viewing

audience. These steps would appear to satisfy the modest Utah "time, place and manner requirement. Surely there is a need, and substantial room, for development of the "context" in which the Utah statute will be applied. See Wardle, supra note 3, at 678.

The district court summarily concluded, in one paragraph that the Utah statute was unconstitutionally vague. 611 F. Supp at 1117; see also 800 F. 2d at 1007 (Baldock, J., concurring). Yet the statute is much more precise than the indecency statute upheld against a vagueness challenge by this Court in Pacifica. 438 U.S. 739-40. Ironically, the very language deemed impermissibly vague by the lower court is language taken from this Court's opinions. Schad, 452 U.S. at 75; Globe Newpaper Co., 457 U.S. at 607. Flexibility is not vagueness. Grayned, 408 U.S. at 110.

The finding of vagueness is especially ironic in light of the lower court's refusal to consider the context of application or the Attorney General's Guidelines.

Since "context is all important," 438 U.S. at 750, in assessing first amendment challenges to the regulation of indecency, and the lower courts' failed to consider the context, the conclusions of overbreadth and vagueness are erroneous.

IV. CONCLUSION

The issues raised in this case are substantial issues of constitutional law. They have far-reaching impact upon the interests of the states in protecting the welfare of children, the privacy of the home, the concerns of adults, and in reasonably regulating the use of public resources. The amici curiae strongly urge

the Court to note jurisdiction and set this case for oral argument.

Respectfully submitted,
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Certificate of Service

I, Lynn D. Wardle, a member of the Bar of the Supreme Court of the United States certify that all parties required by the Rules of the Supreme Court to be served have been served, and that on February 20, 1987, I deposited three copies of this brief in a United States post office or mail box, postage pre-paid, addressed to: Rex E. Lee, Special Assistant Attorney General for the State of Utah, Sidley & Austin, 1722 Eye Street, N.W., Washington, D.C. 20006; Floyd Abrams, Counsel for Home Box Office, Inc., Cahill, Gordon & Reindel, 80 Pine Street, New York, NY 10005; Bryan L. McDougal, Attorney for Community Television of Utah, Suite 735

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